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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NL INDUSTRIES, INC., *Cross-Petitioner*,

v.

C. A. MUNDT, *Cross-Respondent*.

On Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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CROSS-PETITIONER'S REPLY TO CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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CROSS-PETITIONER'S REPLY TO CROSS-RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to this Court's Rule 22.5, Cross-petitioner NL Industries, Inc. ("NL")[1] herein replies to Cross-respondent C. A. Mundt's ("Mundt") Brief in Opposition to NL's Cross-petition in No. 82-1489. NL has this date also filed a Brief in Opposition to the Petition for Writ of Certiorari filed by Mundt in No. 82-1389.[2]

[1] NL Industries, Inc. has no parent companies, or subsidiaries (except wholly-owned subsidiaries) or affiliates which are publicly owned.

[2] NL had opposed Mundt's Petition as part of the brief as to its own Cross-Petition for a Writ of Certiorari filed in No. 82-1489 at 14-15.

REPLY TO MUNDT'S BRIEF IN OPPOSITION TO THE CROSS-PETITION

I. NL DID NOT TERMINATE MUNDT MERELY BECAUSE HE FILED A NOTICE OF A CLAIM UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT BUT BECAUSE THE CIRCUMSTANCES SURROUNDING THAT FILING, ESPECIALLY MUNDT'S ADMITTED MOTIVE, WERE INHERENTLY INCOMPATIBLE WITH HIS CONTINUING TO FULFILL THE RESPONSIBILITIES OF A SENIOR CORPORATE OFFICER.

Contrary to Mundt's suggestion (Brief in Opposition at 3), he was *not* discharged because he "merely filed a Notice with the Labor Department." Instead, Mundt's employment was terminated because of the circumstances surrounding that filing, particularly his admitted motivation to "deal himself a hand." By filing with the Labor Department, Mundt was not attempting to redress age discrimination, which the District Court found not to exist. Rather, he intended to pursue ulterior purposes which included his desire to be "promoted or paid off" and to change the business direction of the company.

In pursuing this course, Mundt failed to communicate with his superiors, adversely affected company morale by involving subordinates in his complaining, and utterly destroyed the trust and confidence between himself and his superiors that was essential to the performance of the Group Vice President's function. By the totality of these actions, which motivated filing of the discrimination claim, Mundt pitted himself against the company's management of which he was a part. Having done so, he acted in a manner entirely inconsistent with the performance of his duties to the company or the retention of his position.

Mundt contends that his situation is distinguishable from the actions described in the cases cited in support of

NL's argument that this Court should recognize a conduct-based exemption from the coverage of the anti-retaliation provisions of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*[3] He agrees that in each of those cases the employee's conduct was "totally inconsistent with his or her obligation to the employer." Brief in Opposition at 3. And in so doing, Mundt, apparently without realizing it, pits himself against the Sixth Circuit.

Although Mundt also attempts to argue that there should be no conduct-based exemption from ADEA coverage, he immediately contradicts himself when he addresses the issue of his own conduct. In attempting to distinguish his conduct from that of the employees in the cases cited by NL in favor of the exemption, Mundt implicitly concedes that such a conduct-based exemption from ADEA coverage must be available in appropriate cases. He thus constructively supports the holdings of the First, Fifth, Ninth and D.C. Circuits in the cited cases. However, in deciding the case at bar, the Sixth Circuit refused to recognize the exemption based on conduct inconsistent with employment duties. That is the reason why NL has cross-petitioned for a writ of certiorari — to resolve the conflict among the circuits on this issue.

NL agrees with Mundt that the cited cases involved individuals who were terminated from employment because their conduct was inconsistent with their obligations to their employers. Mundt's conduct was, according to the evidence, of precisely the same category, especially

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[3] *Smith* v. *Singer Company*, 650 F.2d 214 (9th Cir. 1981); *Pendleton* v. *Rumsfeld*, 628 F.2d 102 (D.C. Cir. 1980); *Whatley* v. *Metropolitan Atlanta Rapid Transit Authority*, 632 F.2d 1325 (5th Cir. 1980); and *Hochstadt* v. *Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976).

given his admitted ulterior motives. Analogous case law demonstrates that NL acted reasonably and properly and that Mundt's conduct should be held to be unprotected by ADEA. The Sixth Circuit erred in not recognizing this exemption, and in attempting to distinguish his own conduct from that described in the case law, which by implication acknowledges the need for such an exemption in certain circumstances, Mundt highlights the court's error. In so doing, his "opposition" really amounts to support for the Cross-Petition.

II. THE POLICIES SUPPORTING THE JUDICIALLY-RECOGNIZED EXEMPTION OF MANAGERIAL EMPLOYEES FROM THE COVERAGE OF THE NATIONAL LABOR RELATIONS ACT ARE EQUALLY APPLICABLE TO AN ACTION INVOLVING ADEA.

NL also has suggested that the holdings below are inconsistent with this Court's decisions acknowledging a status-based exemption of confidential and managerial employees from the coverage of the National Labor Relations Act. In attempting to address this judicially-implied exemption, Mundt focuses only on the collective bargaining aspect of the NLRA. He argues that because ADEA is not directed at protecting that interest, the policy reasons for the exemption of confidential and managerial employees from the NLRA are inapplicable to the instant case. This view is incorrect.

In the first place, the NLRA governs not only collective bargaining but also a broad variety of concerted activities, and it protects employees who engage in these activities from employer retaliation. See 29 U.S.C. § 158(a)(3). However, the implied exemption of confidential and managerial employees is categorical: employees of that level are unprotected by any of the provisions of the NLRA.

In the second place, the policy considerations behind the NLRA exemption and the ADEA exemption sought here are exactly the same. It is inherently contradictory for a senior corporate officer such as Mundt to become the corporation's adversary because the corporation, whose policy he creates, is entitled to his undivided loyalty. *See NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 102 S.Ct. 216, 230 (1981) (Powell, J., dissenting); *NLRB* v. *Bell Aerospace Corp.*, 416 U.S. 267, 283, 289 (1974). For this reason, this Court's decisions recognizing the necessary exemption to the coverage of the NLRA should require a similar exemption as to ADEA.

CONCLUSION

For the foregoing reasons, as well as those set forth in its Cross-petition, NL Industries, Inc. respectfully submits that the writ of certiorari sought in NL's Cross-petition in No. 1489 should issue.

Respectfully submitted:

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